ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF CALIFORNIA.[1]

SUPREME COURT OF VERMONT.[2]

Act of God.

Acts of God.—Those acts are to be regarded, in a legal sense, as the acts of God which do not happen through human agency, such as storms, lightnings, and tempests. If it appears that an injury to the demised premises has been sustained in any way through the intervention of man, it is not the act of God: *Polack* v. *Pioche*, 35 Cal.

The elements are the means through which God acts, and "damages by the elements" are damages by the act of God: *Id.*

Amendment.

Of Writs.—Amendments of writs are not allowed that change the parties to actions; but where a suit is brought only in the firm name of the plaintiffs who are partners, an amendment by inserting the individual names of the members of the firm, is allowable, whether it be by inserting the Christian name only, or a full name: *Lewis* v. *Locke. Homer* v. *Same*, 41 Vt.

Where the plaintiffs were not named in their writ except as Marshall A. Lewis & Co., it was *held*, that the court properly granted leave to amend by inserting the name of Edward Warner, who was one member of said firm, Marshall A. Lewis being the other: *Id.*

Also, where the plaintiffs were not named except as Homer, Bishop & Co., an amendment by inserting the name Samuel John M. before Homer, and the name John O. before Bishop, was *held* allowable: Gen. Sts., ch. 30, § 41: *Id.*

Attorneys.

Power of Court to pass upon their Authority to act.—An attorney's license is *primâ facie* evidence of his authority to appear for any person whom he professes to represent; but if the supposed client denies his authority the court may require him to produce the evidence of his retainer under the supervisory power which it has over its own process and the acts of its officers. This the court may do either upon the direct application of the person or party represented, or upon motion of the attorney of the opposite party to dismiss, founded upon the affidavit of the person or party concerning whom the motion is made: *Clark* v. *Willett*, 35 Cal.

Boundary.

Evidence—Declarations of Deceased Person.—The declaration of a deceased person as to the location of a disputed boundary, otherwise admissible, are not rendered inadmissible by the fact that they were

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[1] From J. E. Hale, Esq., Reporter; to appear in 35 Cal. Rep.

[2] From W. G. Veazey, Esq., Reporter; to appear in 41 Vt. Rep.

made off the land, and because the line referred to was not actually pointed out or shown: *Towers* v. *Silsby and Smith*, 41 Vt.

The question was, which of the two lines, 14 rods apart, was the true range line. One survey of 5th division lots was made in 1806, and one in 1808, and one of these lines was run in one, and one in the other of said years, and the one run in 1808 was conceded to be the true line. In 1830, G., then an old man, since deceased, an original proprietor and one of the committee appointed to procure the survey of 1808, and who made the report as recorded, and for a while, at an early day, the custodian of the proprietors' records and plans, living three or four miles from the 5th division lots, and having one in the same range as defendants' lots, assigned to him as one of the proprietors, told the witness, while at G.'s house, to make a copy of the plan of survey made by direction of the proprietors, that when he should survey in the 5th division he would find two range lines between the lots, and that the west line was the true one. *Held*, that this declaration was admissible: *Id.*

Bounty.

Enlistment on Promise of Bounty—Vote to rescind.—The plaintiff having re-enlisted in the field, to the credit of his town, under an assurance of the authorized recruiting agent of the town, that if he would re-enlist to the credit of said town he would receive such pay as the town paid other soldiers, and the town would probably pay as high as $500: It was *held*, that he was entitled to the bounty subsequently voted by the town to re-enlisted veterans, and his right could not be defeated by a subsequent vote to rescind: *Haven* v. *Town of Ludlow* 41 Vt.

The language of the vote being "to pay to each re-enlisted veteran who has re-enlisted for three years, and who has received no town bounty, $500, and to increase the bounty of those re-enlisted veterans who have received some bounty to $500, excepting commissioned officers, and those who have died leaving no families, and deserters;" the plaintiff having received but $10 under his first enlistment, his right of action accrued upon his re-enlistment and demand and refusal, and having served through his full term and not having received a commission, or died, or deserted, his right of recovery was perfect at the time of trial, in an action brought before his term expired: *Id.*

Conflict of Laws. See *Decedents' Estate.*

Contract.

Consideration—Fraud.—A court of law will not set aside a contract for inadequacy of consideration alone. The inadequacy of consideration may be such as to furnish evidence of fraud: *Kidder* v. *Chamberlin*, 41 Vt.

Corporation.

While the Constitution requires the debts of corporations to be secured by the personal liability of the corporators, and makes each stockholder liable for his proportion of such debts, it leaves to the legislature the power to regulate such liability, and to prescribe the rule by which

each stockholder's proportion of such debts shall be ascertained: *Larrabee* v. *Baldwin*, 35 Cal.

An act of the legislature making each stockholder of a corporation liable for his share of all its debts contracted while he is a stockholder is sufficient to answer the requirements of the Constitution: *Id.*

There is nothing in the Constitution that renders a man who becomes a stockholder personally liable by so doing for his proportion of all the uncancelled debts of the corporation created before he became a stockholder: *Id.*

In an action against the stockholders of a corporation to recover the proportional share of each one of the corporate debts, the proof must show that the defendant was a stockholder when such debt was contracted. Proof of a judgment against the corporation does not show when the debt was contracted: *Id.*

Damages.

Evidence in Action for Punitive Damages.—In an action where punitive damages are claimed, on the ground of malice, either party is entitled to prove any facts or circumstances which tend in the slightest degree either to show malice or to rebut the presumption of malice: *Lyon* v. *Hancock*, 35 Cal.

In such case no fact or circumstance should be excluded unless the court is satisfied to a moral certainty that the jury can draw no rational presumption from it: *Id.*

Damage to Land by Water Ditch.—In an action to recover damages for an alleged injury to the plaintiff's land, resulting from the careless management of the defendant's water ditch, which traversed the land: *Held*, that the defendant was bound to exercise no greater care to avoid the alleged injury to the adjoining lands than prudent persons would employ about their own affairs under similar circumstances: *Campbell* v. *B. R. and A. W. and M. Co.*, 35 Cal.

The true principle applicable to such cases is, that in order to avoid doing a damage to the property of another, a person is bound in law to such care in the use of his own property as a prudent man would employ under similar circumstances, if he were himself the owner of the property exposed to damage: *Id.*

Breach of Contract.—Where a party who contracts with another to make lumber for him, and to pay him a fixed sum therefor monthly, as the lumber is made, breaks the contract, without any fault on the other's part, the rule of damages for the breach is the difference between the cost of making the lumber and the contract price: *Hale* v. *Trout*, 35 Cal.

Where one of the parties to a contract, the performance of which extends through a length of time, refuses to fulfil on his part, and declares the contract at an end, the other may sue for and recover as damages the profits he could have made by the fulfilment of the contract, without waiting for the time to expire: *Id.*

Debtor and Creditor.

Sale void as to Creditor.—The law is perfectly well settled in this state that to render a sale of property void as to a creditor, both the

vendor and vendee must participate in the intent to delay the creditors of the vendor, at least to the extent of the vendee's having knowledge of such intent on the part of the vendor: *Leach* v. *Francis*, 41 Vt.

Decedents' Estate

Commissioners to settle Estates—Creditors—Probate Court.—Where the creditor of an estate presents his claim to the commissioners appointed by the Probate Court for allowance against the estate, it becomes the duty of the commissioners to take cognisance of the claim, to act upon it, and to include it and their action on it in their report to the Probate Court: *Dickey* v. *Corliss, Adm'r.*, 41 Vt.

Where the creditor has duly presented his claim to the commissioners and they intimate nothing to him adverse to its allowance, and the administrator makes no defence or objection, the creditor is justified in resting in the belief that his claim was allowed: *Id.*

When commissioners, without the fault of the creditor, have failed to report a claim to the Probate Court, duly presented before them for allowance, it is the province of the court of equity to save the creditor from his pending loss by holding the estate still bound to do what the law would compel it to do, but for the omission of the commissioners to do their duty, and in this respect the court of equity will be occupying its own peculiar province and not assuming that of the Probate Court: *Id.*

Administrator—Estate in different Jurisdictions.—A person having died in another state, the place of his residence, leaving a portion of his estate there and a portion in this state, claims may be prosecuted against the portion here the same as though the sole administration of the estate was in this state, unaffected by the fact that they could have been prosecuted against the portion in such other state. In such case the running of the Statute of Limitations is suspended, as in other cases during the time between the death of the party and the appointment of the administrator here: *Hicks, Adm'r.*, v. *Clark, Adm'r.*, 41 Vt.

A claim is not merged in a bond in which the obligor stipulates that "such payment of $300, or the *pro ratâ* share thereof as aforesaid, shall be a release and discharge," &c. In such case the payment, and not the giving of the bond, is to be the release and discharge of the claim: *Id.*

Ditches and Ditch Companies.

Evidence—Mode of proving Value of Ditch.—The ordinary and proper mode of proving the value of a water ditch is by showing its capacity, the market value of water in the vicinity, and the probable duration of the demand: *Clark* v. *Willett*, 35 Cal.

In such case evidence of the value or profits of certain mining claims belonging to the owners of the ditch and supplied therefrom with water to mine the same, is inadmissible in evidence to establish the value of the ditch, unless accompanied by further evidence showing that the claims could not be worked without the aid of the ditch: *Id.*

Sale of Water.—Unincorporated ditch companies, organized for the sale of water to miners and others, the stock in which is bought and sold at the pleasure of the owners, without consulting the co-owners,

differ from ordinary commercial partnerships. Some of the incidents of a partnership pertain to such companies, and some of mere tenancies in common likewise pertain to them: *McConnell* v. *Denver*, 35 Cal.

A member of such a company has no general authority by virtue of such membership to bind the company by his contracts: *Id.*

The superintendent or managing agent of such company has no authority to bind the company by a promissory note, given for materials used by the company, unless the authority to give such note is expressly conferred upon him by the company, or such authority may be implied from his acts recognised by the company, with full knowledge of the acts at the time of the recognition: *Id.*

If an unincorporated ditch company duly authorizes its superintendent to give the company note for materials before then purchased by the company, all the members are bound by the note, whether they were such members when the materials were purchased or not: *Id.*

If lumber is furnished a ditch company under the agreement that it is to be paid for out of the proceeds of the ditch of the company, and the proceeds have all been faithfully applied in payment, according to the agreement, the person who furnishes it is not entitled to recover the deficiency against the members of the company: *Id.*

EJECTMENT.

Joint Liability.—If one of two defendants, with the knowledge and consent of the other, employs men to remove buildings and fences from land, turn out the occupants, and take possession, the acts performed and possession so acquired are as much the acts and possession of the one who assented to them in advance, and for whose benefit in part such possession was taken and held, as of the party who actually employed the men and directed the acts to be done: *Treat* v. *Reilly*, 35 Cal.

Judgment—Of what conclusive.—A judgment for plaintiff in ejectment is not conclusive except as against defences actually made, or legal defences that might have been made on the trial, and does not preclude a defendant from asserting a title subsequently acquired: *Mann* v. *Rogers*, 35 Cal.

Where a plaintiff has been restored, under a writ of restitution, to the possession of the demanded premises in an action of ejectment, the defendant so evicted is ever after estopped at law to deny that plaintiff was rightfully restored, and that his own prior possession was wrongful: *Id.*

Judgment—Improvements set off against Damages.—Where an intestate was a tenant in common with the plaintiff in ejectment in the demanded premises, and the defendant entered upon the premises with the permission of the administrator of the deceased co-tenant, the entry of the defendant is not tortious, and the plaintiff is not entitled to a judgment for possession of all the land, but only for his undivided interest: *Carpentier* v. *Small*, 35 Cal.

The right of a defendant in ejectment to set off the value of improvements made by him, against the claim of the plaintiff for damages, depends upon whether they were made by him or his grantors holding under color of title adverse to plaintiff, in good faith, and upon whether they are permanent or not: *Id.*

Estoppel.

Between Landlord and Tenant.—The doctrine of estoppel, which may be said to be founded upon the adage that "the truth is not to be spoken at all times," is a harsh one, and is never to be applied except where to allow the truth to be told would consummate a wrong to the one party or enable the other to secure an unfair advantage: *Franklin* v. *Merida*, 35 Cal.

If A., being in possession of land, deliver the possession to B. upon his request and upon his promise to return it, with or without rent, at a specified time or at the will of A., B. cannot be allowed, while still retaining the possession, to dispute A.'s title; but it is otherwise if B. is in possession and takes a lease from A., since the latter parts with nothing, and the former has obtained nothing by the transaction: *Id.*

The bare possession by the tenant of the demised land at the time the lease is given is sufficient to take the case out of the operation of the general rule, that the tenant cannot, before surrendering possession, dispute the landlord's title. *Tewksbury* v. *Magraff*, 33 Cal. 237, affirmed: *Id.*

Executor. See *Decedents' Estate.*

Felony.

Effect, civilly, of Conviction for Felony.—The forfeitures and disabilities imposed by the common law upon persons attainted of felony, are unknown to the laws of this state. No consequences follow a conviction of felony, except such as are declared by statute: *Estate of Nerac*, 35 Cal.

One sentenced to the state prison for a felony, for a term less than his natural life, is not dead in law. His civil rights in some matters are suspended, but the rights of his creditors are not suspended: *Id.*

Frauds, Statute of.

Assumpsit—Joint Purchase—Consideration.—The defendant having bargained with N. for his farm, stock, and produce, agreed with the plaintiff that they together would carry out the contract with N., sell the property in a short time, and divide the profits. The defendant took no deed of the farm, but had it deeded by N. directly to the persons to whom the plaintiff and defendant sold it in parcels, and all the property was sold in N.'s name. The defendant received the proceeds of the sales: *Held*, that the plaintiff could maintain an action of *assumpsit* to recover of the defendant his share of the profits: *Bruce* v. *Hastings*, 41 Vt.

Held, that the agreement between the plaintiff and defendant to sell and divide profits, though not in writing, was not within the Statute of Frauds: *Id.*

Held, that the plaintiff having advanced money to the defendant to be paid to N. for the property, and having otherwise aided the defendant in the purchase and sale of the property, relying upon the defendant's promise to give the plaintiff a portion of the profits, the agreement was founded on sufficient consideration: *Id.*

INNKEEPER.

Bailment.—The plaintiff, who was a minor, went with his father, with a horse and wagon, to the inn kept by the defendant, to attend the trial of a suit which the innkeeper had brought against the father. When they arrived the horse and wagon were delivered to the servant of the defendant, to be put up and taken care of; and the plaintiff and his father entered the inn where the defendant was in charge, and laid aside their overcoats in the room where they entered, and in presence of the defendant. In due time the father called for dinner for himself and the plaintiff, which they had; and they remained at the inn until evening, when the bill was paid and they left. *Held*, that the relation of innkeeper and guest was thereby created between the plaintiff and the defendant: *Read* v. *Amidon*, 41 Vt.

A guest is not relieved from all responsibility in respect to his goods on entering an inn. He is bound to use reasonable care and prudence in respect to their safety, so as not to expose them to unnecessary danger of loss: *Id.*

A guest having laid his gloves down under his overcoat on a bench in the presence of the innkeeper, it was a question of fact to be determined by the jury in view of all the circumstances, whether he was so careless with respect to his gloves as to exonerate the innkeeper from liability for their loss: *Id.*

JUDGMENT.

Alteration of the Record by the Court—Entry of New Judgment.—There is no doubt but the county court, within certain limits, has such power over its records and judgments as to warrant it in ordering them corrected, and, if necessary, for sufficient reasons to order a case to be brought forward after final judgment, and vacate that judgment, and open the case for further proceedings. In such case, it is ordinarily so far a matter of discretion in the county court, that the Supreme Court will not revise such proceedings on exception: *Smith & Handscomb* v. *Howard*, 41 Vt.

At the next term of the court after a final judgment had been rendered in an action of *assumpsit*, upon motion of the plaintiffs and against the objection of the defendant, the old judgment was brought forward and a new judgment rendered for the same damages with interest on the damages for the intervening time, for the purpose of charging the bail, who had been discharged through failure of the clerk to issue an execution against the defendant's body. *Held*, that the vacating of the old judgment was erroneous: *Id.*

The plaintiffs, or their counsel, desired the execution on the first judgment to run against the body of the defendant, but neglected to direct the clerk so to issue it, and the execution ran against the goods, &c., instead of against the body, and was returned *nulla bona*. *Held*, that if the plaintiffs were entitled to an execution against the body, they should have called for such; that it was not the fault of the clerk that the execution did not run against the body. It being an action of general *assumpsit*, the plaintiffs were entitled *primâ facie* only to such an execution as the clerk issued: *Id.*

It is no part of the official duty of the clerk to issue an execution until it is called for by the party entitled to it: *Id.*

Landlord and Tenant. See *Estoppel.*

What Damages Tenant bound to Repair.—If the embankment of a natural reservoir, which is filled with water by unusual rains, is broken by a stranger, so that the demised premises are injured by the water, the injury is not the act of God or of the elements, and the tenant is bound to repair, even if "damages by the elements or acts of Providence" are excepted from his covenant: *Polack* v. *Pioche*, 35 Cal.

A general covenant of the tenant to repair the demised premises is binding upon the tenant under all circumstances, even if the injury proceeds from the act of God, from the elements, or from the act of a stranger: *Id.*

Master and Servant.

Contract—Tender—Damages.—Where a laborer leaves his employer before his term of service has expired and without his employer's consent, and the employer, although insisting that he does not admit his liability, offers to pay him for his labor at the rate he would have received if he had labored until the end of the time agreed upon, or makes a tender of the amount due at that rate, he (the employer), both by his offer of payment and by his tender, waives the forfeiture of the wages for the services performed. But the laborer is not entitled to recover more than the contract price, in any view of the case, unless he had good cause for leaving: *Patnote* v. *Sanders*, 41 Vt.

The laborer, having left voluntarily, although by the consent and acquiescence of the employer, can recover only *pro ratâ* on the basis of the contract price; and the employer, under the circumstances, is not entitled to recover damages: *Id.*

The tender was intended to be in accordance with the above rule of compensation, but by mistake was ten dollars less than the amount due under the rule. *Held*, that it must be regarded as the mistake and misfortune of the employer, and could not have the same legal effect on the rights of the parties in the case, that it would have had if it had been a tender of the amount intended: *Id.*

Mining Customs.

Proof of.—On the trial of an action to quiet the title to a mining claim, the plaintiffs' title depended upon maintaining their allegation, that by the custom prevailing among the miners of the district embracing their claims, the mode of locating claims therein was for the locators to measure off and designate by stakes on the ground their boundaries, to enter upon the occupation of the same, and to cause a record thereof to be made of such location, in the county recorder's office: *Held*, that the contents of a book kept in said recorder's office, consisting of the records of numbers of such locations—among which, and the first in the order of their registration, was the record of plaintiffs' claim—was properly admitted in evidence as tending to prove such allegation: *Pralus* v. *Pacific G. and S. M. Co.*, 35 Cal.

PARENT AND CHILD.

Enlistment—Emancipation—Soldier's Pay and Bounty.—A minor having enlisted into the military service of the government, with the consent of his father, is entitled to receive and control such compensation as he is entitled to from the government or otherwise, under his enlistment contract; and the town bounty paid by the town to which he gave his credit, belongs to him and not to the father: *Baker* v. *Baker*, 41 Vt.

The consent to the minor's enlistment is a virtual emancipation or discharge of the minor from all obligations of service or obedience to the father, so long, at least, as the enlistment contract exists: *Id.*

But in this case, which was as to whether a town bounty belonged to the father or the son, even if the father had a right to claim the money, there being evidence tending to show that he had relinquished all claim to it and recognised the right of the son to it, and to control it, the case should at least have been submitted to the jury: *Id.*

PARTITION. See *Tenant in Common.*

Where Improvements have been made by the Co-tenants separately.—In an action for partition by one tenant in common of lands granted his co-tenants, where the tenants have severally made valuable improvements on distinct portions of the land sought to be partitioned, the court, by way of interlocutory decree, ordered "that there be set off to the several parties such portions of the premises as will include their respective improvements; provided always, that the rights or interests of neither of the other parties be prejudiced thereby." *Held*, that the order declared the proper rule to govern in such cases, and that the judgment would not be disturbed unless the rule had been departed from: *Seale* v. *Soto*, 35 Cal.

PARTNERSHIP.

Dissolution.—Where one partner has the management of the partnership affairs, and makes false entries in the books, and defrauds his co-partner of a portion of the partnership receipts, and retains the same to his own use, the partner thus defrauded is entitled to a dissolution of the partnership and an accounting, even if the partnership was by agreement to continue for a fixed term and the term has not expired: *Cottle* v. *Leitch*, 35 Cal.

If in such a case there has been an accounting between the partners, and the partner defrauded does not discover the fraud until after the accounting, he may sue for an accounting and dissolution, and on the trial may surcharge and falsify the account, without demanding a reaccounting prior to the commencement of the action: *Id.*

PROBATE COURT. See *Decedents' Estate.*

PROMISSORY NOTE.

Intoxicating Liquors.—A promissory note payable on demand with interest, given for intoxicating liquor bought by the maker, of the payee, to be sold in violation of law, and made under such circumstances that, as between the original parties, it could not be enforced,

and negotiated in due course of business ten months after it was executed, to an innocent holder, for value, who was ignorant of the consideration for which it was given, was *held* to be past due when negotiated; therefore subject to all defences that would have been available if the suit had been by the original payee: *Morey* v. *Wakefield*, 41 Vt.

Assignment.—The delivery of a promissory note payable to bearer by its holder and owner, with a right to collect it and use the avails as needed, is an assignment of it: *Cox's Executors* v. *Mathews*, 41 Vt.

Such a delivery by no means constitutes an agency, or confers upon the holder a mere power of attorney, which is revoked upon the death of the person who delivers it: *Id.*

If at the time of the delivery there was an express understanding that at the death of the person giving it, it should be surrendered to the executor of the deceased if uncollected, it is still an assignment—but an assignment with a limitation—and if the limitation does not appear upon the note itself, the maker of it who has paid it in ignorance of the understanding could in no way be affected by it: *Id.*

Replevin.

Right of Action.—Under the statute (Gen. Sts., p. 320, § 13), the right to the possession, not ownership, as against the defendant only, not others, is all that is necessary to maintain replevin: *Sprague, Adm.*, v. *Clark*, 41 Vt.

A person in possession of property claiming it, or an interest in it, or a legal right to the possession, may maintain replevin against any person taking the property from him, who cannot show a better right to it. The defendant can prevail only when it appears that he is entitled to a return of the property, and that can be only when it appears that his right is superior to that of the plaintiff: *Id.*

This action can be maintained as an adversary proceeding only by force of the statute: *Id.*

Tenant in Common.

Conveyance by less than all the Owners.—A conveyance by one tenant in common, or any number of them less than the whole, of a specific portion of the common lands is not void, but cannot be made to the prejudice of the tenants not uniting in the conveyance: *Gates* v. *Salmon*, 35 Cal.

The grantee at such sale acquires all the interest of his grantor in such special tract, which interest is a tenancy in the special tract with the co-tenants of his grantor: *Id.*

Such conveyance does not sever the special tract from the general tract of which it is a part so far as the co-tenants of the grantor are concerned, and the whole tract is subject to partition, so far as the co-tenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made: *Id.*

Trespass.

Service of Process—Authority of Special Officer.—A person specially authorized to serve process has no authority except that conferred by his deputation; he is entitled to and can claim no respect, considera-

tion, or obedience by reason of his being in a public position until he makes his authority known, or until it is known to those with whom he is dealing; and until then the owner of property which the authorized person is undertaking to attach and carry away, may treat him as a mere trespasser, and protect it against him. But if he resist, having such knowledge, and the authorized person is injured by him, he is liable in an action of trespass for an assault and battery: *Leach* v. *Francis*, 41 Vt.

L., an officer, accompanied by C., the execution-creditor, had attempted to levy upon a mare which F., the debtor, had sold to W., and had been resisted by F. and W., and the mare escaped during the affray, and afterward W. mounted her and rode off. L. then directed C. to take hold of F., and hold him while he went after W. and the mare, which he did. *Held*, that as the execution did not run against F.'s body, and as he did not interfere or threaten to interfere with L.'s going after the mare, this imprisonment of F. was a trespass, and having been done by C. by L.'s direction, both were liable for it: *Id.*

VENDOR AND VENDEE. See *Debtor and Creditor.*

Contracts to convey Real Estate on Payment of Purchase Price—Covenants of, when dependent.—In a contract for the sale of real estate, where the purchaser covenants to pay the purchase-money, and the vendor covenants to convey the premises at the time of payment, or upon the time of the payment of the money, or as soon as it is paid, the covenants are mutual and dependent, and neither can sue without showing a performance, or an offer to perform on his part. Performance, or an offer to perform, on the one part, is a condition precedent to the right to insist upon a performance on the other part: *Hill* v. *Grigsby*, 35 Cal.

Where the purchase-money is payable in instalments, and the conveyance is to be executed on the last day of payment, or on the payment of the whole price, or at any previous day, the covenants to pay the instalments falling due before the time for the execution of the conveyance are independent covenants, and suit may be brought thereon without conveying or offering to convey: *Id.*

The covenants to pay the instalments falling due on or after the day appointed for the conveyance are dependent covenants; and the vendor, in his suit to recover the same, whether he sues for those alone, or joins instalments that became due before the time, must show a conveyance or offer to convey: *Id.*

Where H. agreed to execute and deliver to G. and S. a good deed, conveying all the right, title, and interest of H. in and to one undivided half interest in a certain mill and premises—said deed to be sufficient to convey one undivided half interest in and to said property, free of encumbrance, "upon condition" that G. and S. should pay to H., in specified instalments, the sum of nine thousand and eight hundred dollars, with certain interest, said deed to be executed as soon as said sums are paid: *Held*, first, that the execution of the deed and the payment in full of said sums were intended to be simultaneous acts, and the covenants for their performance are dependent covenants; second, that in an action by H. against G. and S., after all said instalments had fallen

due, to recover said sums, H. could only recover on delivery, or tender of delivery of said deed; and, third, that the covenant of H. to convey would be satisfied by a conveyance or tender thereof of the right, title, and interest which H. had in the undivided half of said property at the date of said agreement: *Id.*

WILL.

Proof by Copy.—A copy of a will may, under certain circumstances, be proved as the will of a deceased person. Therefore, a plea in which the only fact alleged as an objection to the probate of a will, was that "the instrument sought to be established, purports to be only a copy of the will of," &c., *held* insufficient upon general demurrer: *Dudley* v. *Wardner's Exr.*, 41 Vt.

A plea that "said instrument or writing ought not to be admitted to probate, because the same is not entitled to probate as the last will and testament of," &c., also *held* insufficient, it being merely the statement of a conclusion, opinion, or inference, without the allegation of any fact on which it is based: *Id.*

The question can be determined only upon trial, whether the copy presented can be established: *Id.*

LIST OF NEW LAW BOOKS.

ANDREWS.—The Trial of S. M. Andrews for Murder of C. Holmes. By C. G. DAVIS. N. Y.: Hurd & Houghton. Cl. $2.50.

BRIGHTLY.—The Bankrupt Law, with Notes of Decisions. By F. C. BRIGHTLY. Philadelphia: Kay & Bro. Cl. $3.

GRAY.—Reports of Cases in the Supreme Judicial Court of Massachusetts. By HORACE GRAY, Jr. Vol. 15. Boston: Little, Brown & Co., 1869.

HILLIARD.—The Law of Injunctions. By F. HILLIARD. 2d ed. Philadelphia: Kay & Bro. Shp. $7.50.

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